NO. 19

In the Supreme Court of the United States

OCTOBER TERM, 1939

OKLAHOMA PACKING COMPANY, Formerly Wilson & Co. Inc., of Oklahoma, an Oklahoma Corporation, and WILSON & CO., INC., OF OKLAHOMA, a Delaware Corporation,

Petitioners,

VERSUS

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation; OKLAHOMA NATURAL GAS COMPANY, a Corporation; W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS, LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD, and R. C. SHARP, the Directors of Oklahoma Natural Gas Company, a Dissolved Corporation and Oklahoma Natural Gas Corporation,

Respondents.

PETITION OF THE RESPONDENTS FOR A REHEARING

I. J. UNDERWOOD,
R. M. RAINEY,
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INDEX

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PETITION FOR REHEARING

Come now the above named respondents, Oklahoma Gas & Electric Company, a corporation, Oklahoma Natural Gas Company, a corporation, W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the Directors of Oklahoma Natural Gas Company, a dissolved corporation, and Oklahoma Natural Gas Corporation, and present this, their pe-

tition for a rehearing of the above entitled cause, and in support thereof, respectfully show:

We desire to offer a very humble apology to the Court for our failure to clarify the nature of the action dealt with by the Supreme Court of the State in the case of *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 178 Okla. 604, and to cite in our brief the case of *Community Natural Gas Co.* v. *Corporation Commission et al.*, 182 Okla. 137, decided January 25, 1938.

FIRST GROUND FOR REHEARING

In view of our familiarity with the Oklahoma practice, the thought that the opinion in *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 178 Okla. 604, could be construed to sustain a plea of *res judicata* did not occur to us until suggested in the oral argument before this Court. We respectfully suggest that this Court in its statement that "*inasmuch as the scope of the present suit is precisely the same as that of the action in the state court*" shows clearly that it misapprehended the issues which could be adjudicated in said state court action, wherein the recovery of a *refund* was sought, a portion of which was covered by the supersedeas bonds (see amendment to complaint R. 85). *The suit in the state court was a law action.* Under the practice in Oklahoma, a party claiming to be injured by an order of the Corporation Commission which had been affirmed by the Supreme Court legislatively had a right to test the validity of such order in an independent suit in equity, either in a state or a federal court, before a refund

action could proceed. It was in view of such right that the Supreme Court of Oklahoma, in 178 Okla. 604, gave the right-of-way and precedence to this suit in equity. This is explained in the case of *Pioneer Tel. & Tel. Co.* v. *State*, 40 Okla. 417, 429:

> "Said Section 24 of Article 9, *therefore, cuts off the right of a judicial review as to the validity of said order, in an action brought to enforce the refund, but the right to invoke equity jurisdiction by the transmission company to have said order declared invalid is not denied, for such proceeding is not collateral but direct.* * * * *The remedy by law not being available, that by equitable cognizance is.* A judicial review by invoking equitable powers being afforded under the provisions of this Constitution, a direct attack was available to appellant to have declared void said order of the the Commission of October 12, 1908. *This constituted due process of law.*" (Italics ours.)

(The Pioneer case is cited and is the basis of the opinion in 178 Okla. 604, 606, and it is again referred to in *Community Natural Gas Co.* v. *Corporation Commission*, 182 Okla. 137.) In the light of its holding in the Pioneer case the Supreme Court, in 178 Okla. 604, in referring to the suit in the federal court, said:

> "The suit was a *direct attack* upon such order, and *until its validity was established in that suit*, the state court *was without jurisdiction to proceed* with an action based upon such order." (Italics ours.)

It is, therefore, clear that the reason the Supreme Court of Oklahoma in 178 Okla. 604 stayed the action in the state district court was for want of jurisdiction in that court to proceed, *and not because of the application of any doctrine*

of comity. The State Supreme Court's action would have been the same had this suit in equity attacking the order been pending in a state court instead of in the federal court.

In view of the foregoing explanation, and in view of the later and more extended discussion found in *Community Natural Gas Co.* v. *Corporation Commission*, 182 Okla. 137, it is clear that the Court, in 178 Okla. 604, held as follows:

First: That the validity of an order of the Corporation Commission cannot be questioned in an action at law to recover a refund.

Second: That the validity of an order of the Corporation Commission is only subject to attack in a suit in equity.

Third: That a district court of the state is without jurisdiction to proceed in a refund case until the validity of the Commission's order, if questioned, is first established in a suit in equity.

Fourth: That the decision in the Ginners' case was not a bar to the equitable remedy "*which was available to them as the only certain method of obtaining a judicial determination of the validity of the Commission's order.*" (178 Okla. 604). (Italics ours.)

SECOND GROUND FOR REHEARING

Turning now to the case of *Community Natural Gas Co. v. Corporation Commission*, 182 Okla. 137, it is certain that it removes any misunderstanding in regard to the holding of the Court in 178 Okla. 604, and sets at rest the divergent views expressed in the majority and minority opinions herein on the question of *res judicata*, based on that decision.

Whether the case of *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 146 Okla. 272, decided in 1930, is sufficient to generate *res judicata* is a question of state law, and that question is settled by the Community case (182 Okla. 137).

The Community Gas Company, just as did respondents herein, appealed to the Supreme Court of the State from an adverse order of the Corporation Commission (170 Okla. 292 (1934). At the time of the first appeal of the instant order and the decision (146 Okla. 272— 1930) and at the time of the first appeal and decision in the Community case (170 Okla. 292 — 1934) the review by the State Supreme Court was legislative (182 Okla. 137 — 1938). After the decisions on both appeals the Court decided the Ginners' case (174 Okla. 243 — 1935).

The appeal from the judgment of the state district court, in the suit on the supersedeas bonds thereafter came before the state court. *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 178 Okla. 604 (1936, rehearing denied 1937).

The case was reversed with directions that the suit in the state district court be stayed pending the determination

Court. *In the Community Gas Case, on the second appeal* (182 Okla. 137 — 1938) *it was urged that all matters passed upon in the former appeal were res judicata in view of the subsequent decision in the Ginners' case* (174 Okla. 243 — 1935). Such plea was denied and the state Court expressly recognized and enumerated some of the inequitable results which would flow from the application of such a rule. Some excerpts from the Court's four-page discussion of this question are as follows:

> *"Thereafter, this court in the case of Oklahoma Cotton Ginners Ass'n v. State*, 174 Okla. 243, 51 Pac. (2d) 327, *overruled our earlier opinions saying that appeals from rate orders * * * were legislative, and held that such appeals were judicial* (page 140).
>
> * * * * * * * * *
>
> *"Therefore, any later announcements of law upon the same, or other cases, do not suffice to change the essential nature of our previous action in relation to the order considered on the former appeal* (page 141).
>
> "The primary question of law before us is whether in the light of the opinion in the *Ginner's* Case, *supra*, we are to adhere strictly to our former opinion, and treat all matters touched upon therein as *res judicata*, or whether, acting in a judicial capacity, we are to refuse approval to the latest orders of the commission under the circumstances of the case as they now exist. *To adopt the first alternative would be manifestly inequitable.* We failed to speak definitely upon the issue in our former opinion, and took steps which were legislative in nature (page 141).
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> * * * * * * * * *
>
> *"If we had said we were acting judicially, then Community would have had an opportunity to seek a review*

by the supreme Court of the United States of our application of the law relative to the federal questions (page 141).

* * * * * * * *

"In view of what we have pointed out concerning the former order of the commission, and our opinion thereon, *we think it would be manifest injustice to now hold that later views of law impel an adherence to the strict letter of that opinion as approving in a judicial review the legislative action therein considered* (page 142).

"*Community should not be charged with the waiver of any of its rights for its failure to pursue one of the remedies, when we did not then think it could do so because the legislative order was not yet final.* NOR DO WE THINK THAT WE SHOULD NOW HOLD THAT THE RULE OF RES JUDICATA APPLIES AND FORBIDS A JUDICIAL REVIEW THEREOF NOW." (p. 142.)

"We will be saying now that we acted judicially earlier, *and that Community is to be penalized for its lack of ability to anticipate changes in the views of this court on the law*" (p. 143). (All italics ours.)

That the Supreme Court of the State never intended its decision in the Ginners' case to deny to litigants such as respondents herein and the Community Natural Gas Company their day in court does not admit of doubt, and the Court, in its opinion, in order to show that it adhered to and was governed by the rules of fair play, points out that even could a legislative decision by any chance be considered as the basis for *res judicata*, the Court would

not hesitate, in order to defeat such rule's application, to apply some other rule.

The Supreme Court of Oklahoma in the Community case has painstakingly reviewed the question, we believe, in order that there could be no possible doubt that its stated change in decision would not work any departure from or denial of the plain requirements of justice.

THIRD GROUND FOR REHEARING

The *Community Gas* case, 182 Okla. 137, in addition to passing on the question of *res judicata*, positively holds that the *Ginners'* case, 174 Okla. 243, *overruled the prior decisions of the Court* dealing with the capacity in which it reviewed appeals from orders of the Corporation Commission in gas rate cases prior to the Ginners' case. The review of the instant order of the Commission in 146 Okla. 272 (1930) was, therefore, clearly legislative. In view of this fact we invoke our constitutional right to due process under the rule announced by this Court in *Brinkerhoff-Faris v. Hill*, 281 U. S. 673:

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

The State Court, in 178 Okla. 604, and in the *Community* case, 182 Okla. 137, clearly sought to comply with

the federal guaranty of due process which "extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." (*Brinkerhoff-Faris* v. *Hill, supra.*)

Had the State Court, however, not recognized its obligation, and had it held appeals prior to the Ginners' case from orders of the Corporation Commission could generate *res judicata, in view of its recognized and stated change in decision,* it would be the duty of this Court to see that respondents herein were afforded due process of law, and not to permit a change in decision by the State Court to deny respondents their day in court.

FOURTH GROUND FOR REHEARING

We respectfully request the Court to reconsider its holding that the injunction granted by the trial court, and approved by the Circuit Court of Appeals, is prohibited by Section 265 of the Judicial Code, "and not taken out of it by any of the exceptions which this Court has heretofore engrafted upon this act." We still think, as set forth in the dissenting opinion of this Court and in the opinion of the Circuit Court of Appeals below, that the decree enjoining enforcement of the Commission's order appropriately follows the determination of its invalidity, and that enjoining the prosecution of the action in the State Court upon the supersedeas bond is only one of technical importance.

We wish to direct the Court's attention to the fact

that no mention was made in the majority opinion of the case of *Steelman* v. *All-Continent Corp.* 301 U. S. 278, cited at page 8 of respondents' brief, which we think supports our position.

In that case this Court, in an opinion by Mr. Justice CARDOZO, said:

> "What he seeks is an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong. * * * Suits as well as transfers may be the protective coverings of fraud. * * * We are unable to yield assent to the statement of the court below that *'the restraint of a proper party is legally tantamount to the restraint of the court itself.'* The reality of the distinction has illustration in a host of cases" (Italics ours).

In addition, we cannot see any distinction between enjoining a party before he has obtained a judgment which would be contrary to recognized principles of equity and the standards of good conscience, and enjoining him after he has obtained such a judgment.

In view of what the Supreme Court of Oklahoma said and did, as evidenced by its opinion in 178 Okla. 604, it seems to us that the circumstances are such as to make a strong appeal to a court of equity, especially when the merits of the controversy are not questioned by appellants. Respondents having invoked the jurisdiction of a Federal Court of equity on a federal question, and that Court having determined the invalidity of the order

of the Commission, there seems to be no good reason why complete relief should not be afforded, in accordance with recognized principles of equity. There is no substantial reason why this long and involved litigation should not come to an end.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the United States District Court be, upon further consideration, affirmed. In the alternative, if the Court finally concludes that restraint of petitioner by the injunctive feature of said judgment is prohibited by Section 265 of the Judicial Code, then, it is respectfully urged that the injunctive provisions of said judgment alone should be vacated and the remaining portions thereof should be affirmed.

Respectfully submitted,

I. J. UNDERWOOD,
R. M. RAINEY,
STREETER B. FLYNN,
Counsel for Respondents.

CERTIFICATE OF COUNSEL

I, Streeter B. Flynn, counsel for the above named respondents, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

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Counsel for Respondents.